U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0025

GARY L. JOHNSON	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
BAE SYSTEMS SOUTHEAST SHIPYARD a/k/a ATLANTIC MARINE, INCORPORATED	)	DATE ISSUED: Aug. 31, 2015
	)	
and	)	
	)	
ABERCROMBIE, SIMMONS & GILLETTE	)	
	)	
Self-Insured Employer/ Administrator-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Order Vacating Previous Decision and Order and Decision and Order Denying Section 8(f) Relief of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Richard P. Salloum (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer/administrator.

MacKenzie Fillow (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Vacating Previous Decision and Order and Decision and Order Denying Section 8(f) Relief (2013-LHC-01307) of Administrative Law Judge Larry W. Price rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant fell into an electrical board on September 24, 2006, during the course of his employment for employer as an electrician. He sustained burn injuries to his head, face, left shoulder and upper and lower extremities. Claimant also sustained an injury-related psychological condition. Employer voluntarily paid claimant compensation and medical benefits. After the case was transferred to the Office of Administrative Law Judges (OALJ), employer learned at claimant's deposition that he had developed severe migraine headaches and right foot problems after serving in the Army during Desert Storm, for which he was assigned a 40 percent permanent service disability.

On March 5, 2014, employer filed a petition for Section 8(f) relief, 33 U.S.C. §908(f). *See* Emp. Brief at EX 1. On March 25, 2014, claimant and his counsel signed an application for approval of a Section 8(i) settlement, 33 U.S.C. §908(i), between claimant and employer. Employer's counsel signed the application on March 28, 2014, and with it filed an amended petition for Section 8(f) relief. *See* Joint Application for Approval of Agreed Settlement - Section 8(i) at 7-8; *see also* Emp. Brief at EX 2. The Director, Office of Workers' Compensation Programs (the Director), did not participate in the settlement or otherwise respond to employer's request for Section 8(f) relief. On April 3, 2014, the administrative law judge issued a decision approving the private parties' Section 8(i) settlement and ordered, by its terms, that employer pay claimant continuing compensation of $625 per week, retroactive to December 24, 2012. Employer remains liable for medical benefits. Decision and Order Approving Settlement at 1-2. The administrative law judge noted that the settlement agreement stated that employer had reserved the right to seek Section 8(f) relief. *Id*. at 2.

On September 15, 2014, the administrative law judge issued a decision addressing employer's request for Section 8(f) relief. The administrative law judge found that, pursuant to Section 8(i)(4) of the Act, 33 U.S.C. §908(i)(4), the Special Fund is not liable for sums paid by an employer under an approved settlement or voluntarily paid prior to the settlement. Decision and Order at 3. The administrative law judge found that, in this case, employer submitted its original petition for Section 8(f) relief less than three weeks before the parties settled the claim and that, inasmuch as the Director was not a

participant to the subsequent settlement agreement, employer is precluded from seeking Section 8(f) relief, pursuant to Section 8(i)(4). *Id*. at 4. Employer filed a motion for reconsideration because it had not received the Director's response brief. The administrative law judge granted the motion insofar as he permitted employer to file a reply brief. Subsequently, the administrative law judge issued a second decision reiterating his prior finding that Section 8(i)(4) applies to bar employer's claim for Section 8(f) relief, and also rejecting employer's contention that the Director should be equitably estopped from opposing the Section 8(f) petition.

On appeal, employer challenges the administrative law judge's finding that Section 8(i)(4) bars employer's claim for Section 8(f) relief. The Director responds, urging affirmance. Employer filed a reply brief.

Employer notes that it filed its initial application for Section 8(f) relief in accordance with the administrative law judge's prehearing order, with service on the Director. Employer contends that the parties' subsequent settlement agreement contained a provision permitting any party to withdraw from the settlement for any reason prior to its approval. Employer thus avers that had the Director objected timely to employer's Section 8(f) petition, employer could have withdrawn from the settlement until the Section 8(f) issue was resolved. Because the Director failed to respond until after the settlement was approved, employer contends the Director is estopped from objecting, pursuant to Section 8(i)(4), to its Section 8(f) petition.

Section 8(i)(1) of the Act permits the parties in a case to dispose of the claim via a settlement agreement. *See, e.g., Richardson v. Huntington Ingalls, Inc.*, 48 BRBS 23 (2014). Section 8(i)(4) of the Act provides:

> The special fund shall not be liable for reimbursement of any sums paid or payable to an employee or any beneficiary under such settlement, or otherwise voluntarily paid prior to such settlement by the employer or carrier, or both.

33 U.S.C. §908(i)(4). The purpose of this section is to prevent the Special Fund from being held liable for benefits to which only the private parties agreed. *Dickinson v. Alabama Dry Dock & Shipbuilding Co.*, 28 BRBS 84 (1993). In *Strike v. S.J. Groves & Sons*, 31 BRBS 183 (1997), *aff'd mem. sub nom. S.J. Groves & Sons v. Director, OWCP*, 166 F.3d 1206 (3d Cir. 1998) (table), the employer filed an amended Section 8(f) application with the administrative law judge shortly after the private parties' Section 8(i) settlement was deemed approved. The settlement agreement had reserved employer's right to seek Section 8(f) relief. The administrative law judge found the Director estopped from raising Section 8(i)(4) by virtue of his failure to raise objections to the parties' settlement during the 30-day period the settlement application was pending.

Ultimately, the administrative law judge awarded the employer Section 8(f) relief, and the Director appealed. The Board reversed, reasoning that the Director had not been a party to the settlement and that Section 8(i)(4) is a self-executing provision, *i.e.*, it does not have to be raised by the Director in order for it to apply nor does the Director have to object to any of the terms of the parties' settlement agreement.[1] *Id.* at 186. Noting that the purpose of the provision is to prevent employers from seeking post-settlement relief from the Special Fund, the Board held that a "settlement provision purporting to reserve employer's right to later seek Section 8(f) relief or to set the Fund's liability is void as a matter of law." *Id.*

In *Cochran v. Matson Terminals, Inc.*, 33 BRBS 187 (1999), the private parties submitted a settlement application to the administrative law judge and employer renewed its application for Section 8(f) relief. Employer asked that the administrative law judge address its Section 8(f) application before considering the settlement application. The administrative law judge ordered the Director to show cause why employer was not entitled to Section 8(f) relief. The Director responded that because the parties had already entered into a Section 8(i) settlement, Section 8(i)(4) precluded the Special Fund's liability for benefits. The administrative law judge agreed; he denied the claim for Section 8(f) relief pursuant to Section 8(i)(4), but approved the parties' Section 8(i) settlement.

On appeal, the Board reiterated that Section 8(i)(4) protects the Special Fund from liability after an employer enters into a Section 8(i) settlement with a claimant. The Board held that an employer enters into a settlement agreement at the time the parties execute the document, and not at the time it is administratively approved. Under such circumstances, the Director's ability to adjudicate issues affecting the Special Fund's liability has been abridged. In addition, the Board rejected the employer's assertion that the holding in *Strike* applies only where Section 8(f) relief is requested after the settlement is approved. The Board therefore held that the simultaneous submission of a settlement agreement and an application in support of employer's claim for Section 8(f) relief foreclosed the administrative law judge's consideration of the request for Section 8(f) relief. *Id.* at 191-192.

In contrast, in *Nelson v. Stevedoring Services of America*, 34 BRBS 91 (2000), *aff'd on recon.,* 35 BRBS 55 (2001), the Director agreed, prior to the private parties' entering into a Section 8(i) settlement, that employer's evidence met the requirements for Section 8(f) relief and that he would be bound by an order issued after a hearing or based upon the parties' agreement regarding the claimant's loss of wage-earning capacity. The Board held that the Director had approved the Section 8(f) claim before the parties

[1] The Board stated that Section 8(i)(4) contains mandatory language: "The special fund *shall not* be liable. . . ." *Strike*, 31 BRBS at 186.

entered into a Section 8(i) settlement and conceded the Special Fund's liability for the parties' agreed degree of loss of wage-earning capacity. The Board thus concluded that *Strike* and *Cochran* were distinguishable and that Section 8(i)(4) was not applicable; the Director had the opportunity to defend the Special Fund's liability and made a conscious decision to concede its liability for the benefits subsequently agreed to by the private parties. *Id.*, 35 BRBS at 58.

We reject employer's contention that Section 8(i)(4) is not applicable in this case. Section 8(i)(4) unambiguously prevents the Special Fund from being held liable for any benefits paid before or pursuant to a Section 8(i) settlement. In *Strike*, the Board held that, "Section 8(i)(4) does not impose a duty on the Director to raise objectionable settlement terms . . . [the section] requires no action on the Director's part." *Strike*, 31 BRBS at 186. The Director simply had no obligation to respond to employer's request for 8(f) relief prior to approval of the settlement. *Id.* The Board has held that Section 8(i)(4) may not be invoked where the Director previously agreed to the application of Section 8(f). *Nelson*, 35 BRBS at 58. Where the Director has affirmatively acknowledged the legitimacy of employer's claim for relief under Section 8(f) prior to or at the time a settlement is entered into, it is understandable that employer would rely on that acknowledgment and presume that Section 8(f) will apply to the settlement. However, mere silence, when the Director has no obligation to respond prior to approval of the settlement, does not justify comparable reliance. Thus, although employer reserved the right to withdraw from the settlement for any reason, it could not have relied to its detriment on the Director's silence as to employer's claim for Section 8(f) relief.[2] *Strike*, 31 BRBS at 186*; see generally Petit v. Electric Boat Corp.*, 41 BRBS 7 (2007).

The administrative law judge's conclusion that employer's claim for Section 8(f) relief is barred by Section 8(i)(4) accords with law. Therefore, we affirm the administrative law judge's denial of Section 8(f) relief. *Cochran*, 33 BRBS 187; *Strike*, 31 BRBS 183.

[2] Thus, that the settlement here arguably was executory until it was approved (or until the expiration of 30 days), unlike the settlements in *Cochran*, 33 BRBS 187 and *Strike*, 31 BRBS 183, is of no legal significance as the administrative law judge's approval of the parties' settlement precludes the Special Fund's liability. 33 U.S.C. §908(i)(4).

Accordingly, the administrative law judge's Order Vacating Previous Decision and Order and Decision and Order Denying Section 8(f) Relief is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge